United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-1291

To be argued by
JOSEPHINE Y. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1291

UNITED STATES OF AMERICA,

Appellee,

—against—

VIRGIL P. RIVERS, JR., and
EDWARD T. COPELAND,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

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ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Appellants appeal from judgments of conviction entered on July 25, 1975, following a trial by jury before District Judge Mark A. Costantino in the United States District Court for the Eastern District of New York. Appellants were found guilty of armed robbery and conspiracy to commit armed robbery in violation of §§2113(a) and (d), and 371 of Title 18, United States Code. Rivers was sentenced to 18 years for armed robbery and 5 years for conspiracy, sentences to run concurrently, and Copeland was sentenced to 15 years for armed robbery and 5 years for conspiracy, sentences to run concurrently. Both defendants are serving their sentences.[1]

[1] Counsel for appellant Copeland has filed an *Anders* brief asking to be relieved as counsel on this appeal. Counsel for Cope-

[Footnote continued on following page]

Appellant Rivers contends that there are three issues on appeal, all of which were decided erroneously by Judge Costantino at the pretrial suppression hearing: (1) the admissibility of Rivers' two signed confessions; (2) the in-court identification of Rivers by witness Nierenberg and (3) the so-called refusal of the district judge to issue an advance ruling on the scope of cross-examination that would be allowed the Government as to his subsequent, similar criminal conduct.

Appellee, the United States, takes the position that the confessions were voluntary, and appellant was fully and repeatedly advised of his rights, that the in-court identification was legally permissible, and that defendant was not denied due process by the court's reserved decision on the admissibility of evidence relating to his similar, subsequent criminal conduct.

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land states that the only possible issue on appeal is whether the introduction of the written confession of co-defendant Rivers, naming Copeland as his accomplice in the bank robbery, violated Copeland's constitutional rights. The trial court held, prior to trial, that no problem existed with respect to statements of co-conspirators under *United States* v. *Bruton*, 391 U.S. 123 (1968). The written confession of Rivers and the oral confession of Copeland interlocked in every detail except that Copeland refused to name the individual associated with him in the robbery. *United States ex rel. Ortiz* v. *Fritz*, 476 F.2d 37 (2d Cir. 1973), *United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 45 (2d Cir. 1975). Consequently, counsel for Copeland takes the position that there are no non-frivolous issues on which to appeal. In agreement with this view, the United States has moved to dismiss the appeal of Copeland.

Statement of the Case

On August 8, 1974, the grand jury returned an indictment charging Virgil P. Rivers, Jr., and Edward Terrance Copeland with violating Title 18 U.S.C. §§ 2, 2113(a) and (d), and conspiring to rob a federally insured bank, § 371.

The Government's case was presented through the testimony of a bank patron, Jerrold Nierenberg, a bank teller, Gail Harari, the branch manager, Robert Wims, F.B.I. Agent William Augustitis and defendant's employer, John Lefkowitz.[2]

Mr. Nierenberg, the teller and manager testified to the fact that two Black males entered the First National City Bank at around 11 o'clock in the morning of July 15, 1974. One man called out, "This is a stickup" and stationed himself in the middle of the floor with a rifle. The second man vaulted the counter and proceeded to take money from the drawers. After about four minutes, the man with the gun called, "time" and the two fled with $3,310 (T. 188-94, 226-28, 246-49; A. 67-71).

The patron, Jerrold Nierenberg had, while walking to the bank just prior to the robbery, noticed two Black males in a yellow medallion cab, with "H.E.W." lettered on the side. He believed that one of the males in the cab (appellant Rivers) was the same person who held the rifle during the robbery (T. 185).

After the robbers fled the bank, Nierenberg went to the window and observed that the cab was no longer there

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[2] It was stipulated by attorneys for the Government and for the defendants that the First National City Bank was insured by the Federal Deposit Insurance Corporation.

(T. 194). The next day Nierenberg identified Rivers' picture from among six photographs shown him by the F.B.I. agent (T. 194-98). He made an in-court identification of Rivers at the trial (T. 206-07; A. 72-73). No one else in the bank was able to identify Rivers because his face was partially covered.

Mr. Lefkowitz testified that he owned two cabs with "H.E.W." stenciled on the doors. He identified the hack license he obtained for Rivers as driver of one of the two cabs. He also identified the trip ticket for each of the cabs. The one driven by a Mr. Ramirez showed the time and destination of rides he gave during his tour of duty. Rivers' ticket covering the time of the robbery showed no entries but bore a notation that the original trip card had been lost (T. 278).

Agent William Augustitis testified that he placed Rivers under arrest at the 112th precinct, Queens, on the evening of July 27, 1974. Copeland was arrested at his residence by FBI agents and New York City police on the morning of July 29, 1974 (T. 7, 33-34, 295-96). Both defendants were advised of their rights orally immediately following their arrest (T. 7-9, 34-36, 296-98; A. 8-10).

At this time, Rivers[3] acknowledged that he understood his rights (T. 10, 299; A. 11). Special Agents Augustitis and Phillips Mitchell did not question Rivers during his transport to F.B.I. headquarters in Manhattan. Upon arriving at headquarters, Rivers was advised of his constitutional rights a *second* time when Agent Augustitis read from the Interrogation and Ad-

[3] In view of the position taken by counsel for Copeland, n. 1 and the United States' motion to dismiss Copeland's appeal, the remaining discussion will primarily concern the facts pertaining to Rivers.

vice of Rights Form which was also handed to Rivers. Rivers signed the form (T. 13-15, 302-05; A. 14-16).

After the agents interviewed Rivers, Agent Augustitis prepared a handwritten statement based on information disclosed by Rivers (T. 20-21, 309; A. 21-22). Before signing the statement, defendant was advised of his rights a *third* time (T. 22, 311-312; A. 23). Defendant read and signed the Waiver of Rights form (T. 312) and the statements written by Augustitis (T. 24-26, 313-317; A. 25-27). The statements were confessions that Rivers had, in fact, committed armed robbery as charged in the indictment. One statement named Copeland as his accomplice.

Agent Augustitis testified that at no time did Rivers appear to be ill or complain of feeling ill (T. 52-4, 57, 64, 305-06, 360-61). He also testified that Rivers never requested a lawyer and did not ask to make any telephone calls before he signed the statement (T. 43, 362-63, 376-78; A. 378).

Rivers, however, testified at the pre-trial hearing that: he was not advised of his rights; he felt ill because he was experiencing "withdrawal from drugs"; he knew what was going on at the interview; signed but did not read the statement, and was not sure if he had asked for a lawyer (T. 103-110; A. 36-42).

The above testimony of Rivers and Agent Augustitis was offered at the pre-trial hearing on June 9 and 10, 1975. Agent Augustitis testified to the same effect at the trial at which Rivers did not testify. Counsel for the defendant moved at the conclusion of the Miranda hearing to suspend the statement made by Rivers on the ground that he was, due to withdrawal symptoms,[4] in-

[4] Rivers admitted to a heroin habit which required three intravenous injections daily at a cost of $100.00 per day. (T. 100-101; A. 33-34).

capable of making an intelligent waiver of rights (T. 139). The motion was denied by Judge Costantino on the basis that defendant was properly advised of his rights and his statements were voluntarily made (T. 139-40).

At the pre-trial hearing, counsel for Rivers also moved to suppress an in-court identification of defendant by a witness (Jerrold Nierenberg) who had seen defendant in a taxi parked near the bank immediately before the robbery. The witness identified Rivers the day after the robbery from a photographic spread. The court denied defense counsel's motion to suppress, finding that the photographs were not suggestive and the identification was permissible (T. 145-46; A. 49-50).

At the conclusion of the preliminary hearing, counsel for Rivers' co-defendant inquired if Judge Costantino would permit evidence at trial concerning co-defendant's past crimes or pending criminal prosecution. Counsel informed the court that Rivers and Copeland were indicted on January 13, 1975, in Supreme Court, Kings County for armed robbery and grand larceny. Counsel for Rivers joined in the request to exclude testimony relating to the January 13, 1975 crime. The Assistant United States Attorney stated that if either defendant took the stand, the United States would inquire as to the facts of the case. The court reserved decision on this point but stated its opinion that such facts would be admissible (T. 148-160; A. 52-63). Counsel for defendant Rivers now states that this ruling by the court resulted in her decision not to call Rivers as a witness. Consequently, it is alleged, he had no opportunity to controvert his confession and was deprived of a fair trial (App. Br. 13-14).

At the trial, the confessions of Rivers were admitted in evidence. Witness Nierenberg made an in-court identification of defendant. Rivers' counsel did not call him

to testify. The jury convicted defendant of the crimes charged.

ARGUMENT

POINT I

The trial judge correctly ruled that defendant's confessions were admissible for the reasons that defendant was fully informed of his rights, and voluntarily and knowingly waived assistance of counsel, and made and signed the statements of confession.

This was not a confession, as counsel suggests by the authorities cited, wrested from an insane man, *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); or from an escaped, wounded prisoner, first with two guns pointed at his head and later doped with morphine and threatened with a lynch mob, *Beecher* v. *Alabama*, 389 U.S. 35 (1967); or from an addict to whom a police physician had administered depressants by injection and pills, *Townsend* v. *Sain*, 372 U.S. 393 (1963); or from a drugged or drunk (or both) passenger in a car transporting narcotics from Mexico to the United States, who had to be picked up from the floor when given his Miranda rights, *United States* v. *Guaydacan*, 470 F.2d 1173 (9th Cir. 1972); or from a 15 year old, questioned for five hours, held incommunicado and never advised of his rights until after his "confession," *Haley* v. *Ohio*, 332 U.S. 596 (1948).

Here, according to the F.B.I. agent's testimony summarized in the Statement of the Case, Rivers was advised of his rights at least three times, acknowledged that he understood his rights and did not request a lawyer or ask to make a telephone call. The careful notations of time,

signatures of the defendant and witnesses, initialing by defendant of each page of the statement at the upper left and lower right corners convincingly establish that the agent "went by the book." He meticulously adhered to the F.B.I. procedure which the Supreme Court had commended in *Miranda* v. *Arizona*, 384 U.S. 436, 483 (1966). The waiver of rights procedure observed as well the prescriptions of the most recent statement of due process requirements in the Model Code of Pre-arraignment Procedure (§ 140.8(2)). The period of processing and questioning was reasonable (*id.* § 140.8(4) and commentary at 50-52).

As to Rivers' physical and mental condition before and during the interview at F.B.I. headquarters there are, quite obviously, contradictory versions in the record. Agent Augustitus testified that Rivers requested food and ate it when it was provided; Rivers maintained that he did not eat (T. 12, 20, 103; A. 13, 21). The agent stated that defendant did not complain of physical discomfort during the interview; Rivers averred that he was perspiring, experiencing hot and cold spells and cramps (T. 43, 64, 104). Rivers testified that he required an injection of heroin every eight hours. Yet, he went approximately twenty hours, without discomfort, from his last injection on July 26, 1974, before seeking the next dose (T. 126). Therefore, his alleged incapacitation during the interview, due to deprivation of heroin, lacks credibility. Based on the entire record, it is a fair conclusion, as defendant himself acknowledges, "I understood what was going on" (T. 113; A. 45) and he signed the statement with a firm and steady hand. (T. 109; A. 41; Exhibit 7; Appellant's Appendix p. 7).

Indeed, the confession is unimpeachable on due process grounds and defendant was accorded his constitutional rights under the Fifth and Sixth Amendments.

POINT II

The in-court identification of appellant by witness Nierenberg was properly allowed.

Appellant contends that the photographic spread shown to Mr. Nierenberg, was so impermissibly suggestive as to preclude an untainted in-court identification, and secondly, that the in-court identification itself was so unfair as to make it inadmissible. Appellant's position is supported by neither the record nor the law.

Appellant's attorney argued at the pre-trial suppression hearing that the spread was suggestive (T. 142; A. 46). The court, after reviewing the testimony and specifically examining the six photographs in question, made an explicit finding of fact that the spread was not impermissibly suggestive (T. 145-6; A. 49-50). *Compare*, *Simmons* v. *United States*, 390 U.S. 377 (1968).[5]

Appellant's alternative argument, that an in-court identification is automatically an improper show-up, was no more impressive to the court.

Time and again this Court has held that an in-court identification of a defendant based upon a witness' independent recollection of the event is admissible. *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973); *United States* v. *Messina*, 507 F.2d 73 (2d Cir. 1974).

The only factors which must be considered are those concerning the witness' opportunity to observe the incident in question. So long as the witness had ample time and means to observe the defendant at the time of the event, his identification at the time of trial is admissible.

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[5] The spread will be available for this Court's inspection at the oral argument. We note that the spread was used during the course of the investigation and not following indictment.

As Judge Costantino noted in response to appellant's counsel's argument that the witness was incompetent (T. 146; A. 50):

> " * * * You say he has never seem (sic) him? He identified a picture because he *did* see a person that resembled a picture. That is what the agent said with reference to Mr. Nierenberg's identification and the reason why they (sic) selected the picture of Mr. Rivers, because he had seen him in the flesh and he could identify him from a photograph (T. 146-47; A. 50-51).

(Emphasis supplied).

The Court correctly pointed out, albeit within the context of the colloquy of the moment, that assuming Mr. Nierenberg's testimony illustrated an ample opportunity to observe appellant on the day of the robbery, his identification in court, based on his recollection of that day, was proper. *See, United States* v. *Wade*, 388 U.S. 218, 240 (1967); *United States ex rel. Cummings* v. *Zelker*, 455 F.2d 714, 716-717 (2d Cir. 1972); *United States* v. *Famulari*, 447 F.2d 1377, 1380 (2d Cir. 1971); *United States* v. *Ayers*, 426 F.2d 524, 527 (2d Cir. 1970).

Appellant's final argument with respect to the identification, that Nierenberg's in-court identification was an impermissibly suggestive show-up, is not novel to this Court. It has been raised numerous times in the past, and rejected in as many cases. *See e.g. United States* v. *Hamilton*, 469 F.2d 880, 883 (9th Cir. 1973); *United States* v. *Kaylor*, 491 F.2d 1127, 1131-1132 (2d Cir. 1973).

In *United States* v. *Famulari*, *supra*, 447 F.2d at 1378-1379 (2d Cir. 1971), this Court was faced with deciding whether or not an in-court identification of a defendant

was tainted because the witness had seen him through the window in the courtroom door just before testifying.[6] The Court held that even though the witness was confronted with the defendant sitting at counsel table, this did not necessarily taint his identification from the photos, nor preclude his identification in court. The criterion for determining if a show-up is violative of due process is whether or not it is suggestive; it must be clear that the witness was overly influenced by the circumstances of the confrontation in order to preclude it. This was clearly not the case here, for as this Court noted in *Famulari* (an observation which is also applicable to the case at bar):

> "Indeed, (the witness') continued insistence that he could not be sure of the photographic identification, even when he found out that the man he had picked out was named as a defendant and was implicated by an accomplice, indicates that he was not a person readily susceptible to suggestive influences" (*Id.* at 1381).

In summary, the photographic identification was proper and admissible. The in-court identification, based on the witness' recollection of the robbery was admissible whether

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[6] In *Famulari*, as in the instant case, the witness had previously selected appellant's photo from a spread as one "similar" in appearance to the robber. The witness stated that he could not identify the photo positively, but would probably recognize the defendant in person. *Supra*, at 1378-1379.

In this case Nierenberg stated that the photo he selected "closely resembled" the robber, but that it looked like a "thinner-faced" man (T. 220).

[7] If this case were remanded for a hearing we would be prepared to show Mr. Nierenberg was told, during the course of his preparation for trial, that appellant had signed a full written confession of his role in the bank robbery. Knowing that, he candidly continued to say that the best identification of the photograph he could give was that it was "similar" to the man he had seen (T. 196).

or not the photographic identification was tainted, and there was no showing at all that the witness was ever influenced to identify appellant for any reason other than the fact that it was he who robbed the bank. In light of these three separate justifications the in-court identification was proper and hardly grounds for reversal.

POINT III

Appellant Rivers was not entitled to a definitive advance ruling on whether evidence of similar crimes would be admitted.

Appellant contends that since "the signed confession of Rivers was the most incriminating evidence against him . . . it became crucial for Rivers to take the stand on his own behalf. . . . However, *after the court ruled that it was permissible to use the pending indictment* of Rivers and Copeland to impeach Rivers, he did not testify" (Br. 13) (emphasis supplied). Appellant states that the "record is clear" that Rivers would have testified but for this "ruling" of the trial judge (Br. 14).

First, we must interject that the record is in no wise clear or informative that counsel, before the admissibility issue was raised, firmly intended to call Rivers to the stand. Secondly, Judge Costantino did not *rule*, but *reserved decision* on the admissibility of the evidence, offering a tentative affirmative opinion. But the most significant discrepancy in appellant's version of the colloquy which transpired rests in appellant's interpretation that the prosecution proposed to allude to a pending indictment if Rivers took the stand.

The matter arose in the following manner: at the conclusion of the *Miranda* and *Wade* hearings and, prior to selection of the jury, counsel for co-defendant Copeland requested under *Luck* v. *United States*, 348 F.2d 763

(D.C. 1965), an advance ruling with respect to the use by the prosecution of prior convictions of defendant Copeland. In the ensuing discussion, the Assistant United States Attorney informed the court that both defendants had been indicted in Kings County for armed robbery on January 13, 1975.[8] He stated: "If either of the defendants take the stand, the Government should have the right to inquire *as to the facts of that case.*" (Emphasis supplied). The court responded: "I will reserve decision at this point as on the prior similar acts." A moment later the court stated: "I would reserve on it, however, but my opinion is that it is admissible." And a third time: "I have reserved . . . on the [pending] robbery case." (T. 155; A. 58). Sometime later in the course of the colloquy, appellant's counsel made a *Luck* motion. At this stage, the Assistant United States Attorney expressed the position that as to the pending state matter "the Government would reserve the right to inquire into such matters should the defendant elect to take the stand." (T. 158; A. 61).

What is lacking in the above exchange is every element on which appellant now bases his argument: (a) that the judge unequivocally *ruled*, (b) that a *pending indictment* (c) could be introduced on cross-examination to *impeach appellant's credibility.*

The appellant attempts a feat of legal transvestism. Appellant cl[illegible]ks proof of other criminal acts with the protective garb heretofore available only to proof of convictions for the purpose of impeachment. Where the prosecution intends to cross-examine defendant as to a

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[8] Mr. Levin-Epstein: "I will inform the Court that an indictment has been filed in the Supreme Court of Kings County as of January 13, 1975, charging Mr. Rivers and Mr. Copeland, as co-defendants, in an armed robbery indictment, two counts of unarmed robbery, two counts of grand larceny and one count of possession of a firearm." (T. 154; A. 57).

prior conviction, defendant has under *Luck* v. *United States*, 348 F.2d 763 (D.C. 1965) and subsequent cases (*e.g. Walker* v. *United States*, 363 F.2d 681 (D.C. 1966); *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969); *United States* v. *Cacchillo*, 416 F.2d 231 (2d Cir. 1969); *United States* v. *O'Day*, 467 F.2d 1387 (9th Cir. 1972)), applied to the court for an advance ruling to determine the admissibility of the conviction.

This Court and other courts which have adopted the basic approach in *Luck* accord a scope of discretion to the trial judge in deciding the issue of admissibility. In *United States* v. *Palumbo*, *supra*, 401 F.2d at 273, this Court suggested the factors to be considered by the judge in deciding whether or not a conviction may be introduced for impeachment purposes.

But the *Luck* doctrine is not applicable to this case.[9] The issue here is whether or not the prosecution may inquire into the underlying facts relating to appellant's

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[9] The instant case is readily distinguishable from *United States* v. *Semensohn*, 421 F.2d 1206 (2d Cir. 1970), relied upon by appellant, in which this court reversed defendant's conviction for willful evasion of military service. In *Semensohn*, the prosecution questioned defendant about a conviction for grand larceny. In fact, there was no such conviction; defendant had pleaded guilty to a misdemeanor and had not been sentenced. While a conviction is admissible to impeach credibility (Fed. Rules of Evidence, Rule 609(a)), it must be a final conviction; sentence must have been imposed and the time to appeal expired. *Id.*, at 1208.

United States v. *Kahan*, 479 F.2d 290, 294 (2d Cir. 1973), is also unsupportive of appellant's argument. *Kahan* simply reiterated the familiar principle that a witness' misconduct not resulting in a conviction may not be admitted to impeach his credibility. The Supreme Court reversed, 94 S. Ct. 1179 (1974) as to the issue of admissibility of defendant's false statements at arraignment. These statements pertaining to defendant's indigency were held admissible in the government's direct case. Again, in *United States* v. *Williams*, 484 F.2d 428, 432 (8th Cir. 1973), the issue of admissibility related solely to a conviction.

conduct on January 13, 1975. As to that, the rule of law is settled.

Rule 404 of the Federal Rules of Evidence embodies the inclusionary rule which is in accord with Federal practice and the principle followed in this circuit.

> Rule 404(b) other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This court has held that evidence of other criminal acts may be introduced (a) unless solely to demonstrate defendant's criminal character and (b) provided its probative value outweighs potential prejudice. *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir. 1975); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966).

The facts relating to Rivers' criminal conduct of January 13, 1975, in the light of established federal practice, could be raised by the prosecution, and defendant, if he testified on his behalf, could be questioned as to the facts. They are *similar acts*—armed robbery and grand larceny—this time pertaining to a grocery store rather than a bank; they reveal a *pattern or course of criminal activity*. They demonstrate *intent*, a state of mind inconsistent with mistake, accident or inadvertence. They point to a common *motive*—the need for money, quite probably to support Rivers' heroin habit. They exhibit *preparation* and *plan* undertaken by the same conspirators—Rivers and Copeland—who robbed the bank in Brooklyn. And they are probative of the *iden-*

tity of the conspirators. *See, United States* v. *Armone*, 363 F.2d 385, 403-404 (2d Cir.), *cert. denied sub nom., Viscardi* v. *United States*, 385 U.S. 951 (1966). Meeting all these tests for admissibility, Rivers' subsequent criminal conduct could properly have been introduced. The trial judge's preliminary opinion that it was admissible, even if such opinion caused counsel to refrain from putting defendant on the stand, did not deprive defendant of a fair trial.

Our research has disclosed no post-*Luck* holding by a federal court that defendant is entitled to an advance ruling on the admissibility of facts underlying a crime with which he has been charged, whether antecedent or subsequent to the offense for which he is being tried. The choices open to a defendant where other-crimes evidence is admissible under Rule 404(b) would be (a) not to testify; (b) to testify and object to questions eliciting prejudicial matter; or (c) to invoke the privilege against self-incrimination as to all or certain of the questions posed. If defendant elects (b), is it to be supposed that the trial judge will not exercise his supervisory power to prevent undue prejudice or that defendant's counsel will not be alert to object to improper questions? If these safeguards fail, then defendant has a record on which to appeal.

Perhaps appellant might concede that in some cases other-crimes evidence would be admissible. But appellant argues that in the case before us the trial judge was obligated to rule in advance precluding cross-examination into the facts of the January 13, 1975 robbery.

Precisely this same issue was raised in *United States* v. *Pfingst*, 477 F.2d 177, 193 (2d Cir. 1973). In *Pfingst*, appellant argued as here, that failure of the trial court to rule against admission of subsequent criminal acts prevented defendant from taking the stand and was the

critical fact leading to his conviction. On appeal, *Pfingst* contended that the trial judge abused his discretion. This court in affirming the conviction observed:

> Had the acts on which the government sought to cross-examine been completely irrelevant . . . appellant's claim might be in a different posture here. Under the circumstances, however, the trial judge certainly did not abuse his discretion in refusing to restrict the scope of the possible Government cross-examination of Pfingst in advance of Pfingst's direct testimony. (*Id.* at 194).

In the alternative, if appellant was entitled to an advance ruling on the admissibility of other-crimes evidence directed at illuminating intent, motive, plan, preparation and identity, should not appellant's counsel have pressed for a firm ruling? If appellant may in such circumstances demand a decision, as of right, then we submit, this appellant has not exhausted the proper procedure to preserve the issue for review. In its present stance, the case turns merely on a reserved decision and a tentative opinion which, in turn, imposes on the appellate court the burden of rendering a decision in the abstract as to what prejudice, if any, the defendant would suffer if, hypothetically, the trial judge admitted evidence of the facts relevant to subsequent criminal conduct.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: October 14, 1975

Respectfully submitted,

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United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
JOSEPHINE Y. KING,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 17th day of October, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

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New York, N.Y. 10007

John C. Corbett, Esq.
66 Court Street
Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
17th day of Oct. 1975

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977